LIBRARY
SUPT. U. S.

Office-Supreme Court, U.S.
FILED
OCT 10 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 532

GENE O'NEAL AND JOHNNIE JAMES YOUNG,
PETITIONERS,

versus

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN P. GARDNER,
ROBERT L. KILGO,
Darlington, South Carolina,
Attorneys for Petitioners.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reasons for Granting the Writ:	
(1) The Court of Appeals has decided a Federal question in direct conflict with applicable decision of this Court	4
(2) There is a conflict among the Circuits on the issues presented	5
(3) The Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court	5
Conclusion	7
Appendix	9

CITATIONS

	PAGE
Jones v. United States, 78 S. Ct. 1253, 357 U. S. 493, 2 L. Ed. (2d) 1514	4
Silverman v. United States, 365 U. S. 505, 5 L. Ed. (2d) 734, 81 S. Ct. 679	5, 7
Morrison v. United States, 262 Federal (2d) 449, 104 U. S. Appeal 352	7
Walker v. United States, 225 Federal (2d) 447	7
Care v. United States, 231 Federal (2d) 22	7
District of Columbia v. Little, 178 Federal (2d) 13, 85 U. S. Appeal D. C. 242	7

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

GENE O'NEAL AND JOHNNIE JAMES YOUNG,
PETITIONERS,

versus

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on September 10th, 1963.

The opinion of the District Court (App. Page 11) is not reported.

The opinion of the Court of Appeals (App. Page 27) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10th, 1963 (App. Page 27). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the forceful nighttime entry into a wash house, a part of a dwelling, to arrest a person reasonably believed within, upon probable cause that he has committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment?

2. Whether a federal officer may without warrant and without consent physically entrench himself into a man's home, and secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard?

STATEMENT

Robert R. Briggs is an investigator for the Alcohol and Tobacco Tax Division of the Treasury Department of the United States. On the evening of June 10th, 1960 at sundown, Agent Briggs and two other agents of the government went to the area surrounding the home of the petitioner, Gene O'Neal, near the City of Darlington, South Carolina. They secreted themselves, according to Mr. Briggs' testimony, at a point in some woods approximately five to seven yards back of a wash house, which was located about ten yards from the house of the petitioner, Gene O'Neal (the actual distance of the wash house is somewhat in dispute). In the wash house, there is plumbing, washing machines, old furniture, etc.; the building was used by petitioner's wife as a laundry room and as an annex of her home. Briggs testified that they could see lights shining through small cracks in the barn and occasionally could

hear slight sounds and movements, and could detect the odor of non-tax paid whiskey coming from the barn (throughout his testimony, Briggs referred to this building as a barn). From the point at which the officers were secreting themselves, they saw some people, one of whom was later identified as the petitioner, Young, remove several cardboard boxes from an automobile and place them near the back steps of the home of O'Neal. At about twelve o'clock the government agents stealthily approached the wash house; listened to a conversation at the door (which was later used against the petitioners); opened the door and there inside of the building arrested the petitioners. They had neither a search warrant nor an arrest warrant at the time. In the wash house or barn, there was located a quantity of non-tax paid alcohol. The alcohol together with the petitioner's automobile and all jars were confiscated by the government agents.

Petitioners made timely motions to suppress at the trial the evidence acquired by the government agents on the grounds that their conduct constituted an unreasonable search and seizure against which the petitioners are protected by the Fourth Amendment to the Constitution of the United States. This motion was overruled by Judge Wyche at the hearing thereof on the 5th day of December, 1962.

The Petitioners waived a jury and were tried on the 10th day of December, 1962, before the Honorable C. C. Wyche, Presiding Judge of the United States District Court for the Eastern District of South Carolina, Florence Division.

At the trial, counsel for the petitioners objected to the testimony offered by Briggs on the grounds that his testimony resulted from an unreasonable search and seizure, which is prohibited by the Fourth Amendment to the United States Constitution. By agreement of counsel, petitioners'

objection applied to all the testimony of Briggs. Petitioners' objection was overruled by the trial judge and at the conclusion of the testimony of Briggs no further evidence was offered by either the government or the petitioners. The petitioners were found guilty by the trial judge and sentenced.

From the trial judge's refusal to suppress the testimony and from his overruling of the objection of petitioners to the testimony offered by the government at the trial, the resulting conviction and sentencing of the petitioners, the petitioners appealed to the United States Court of Appeals for the Fourth Circuit, which Court affirmed the rulings of the District Court by opinion dated and filed September 10th, 1963. The reason stated for affirmance by the Court of Appeals was that the search was valid because a crime was being committed in the presence of the officers and the search was incidental to a valid arrest.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court has stated that the facts under consideration here constitute a grave constitutional question.

In the case of *Jones v. United States*, 78 S. Ct. 1253, 357 U. S. 493, 2 L. Ed. (2d) 1514, the Court had this to say in paragraph six of the opinion: "These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment".

The facts in this case squarely fit the above question. The federal agents had no warrant of any kind; it was after

midnight when they were arrested. Although the testimony is somewhat confused as to whether petitioners opened the door of the wash house or whether the government agents did, there can be no question but what the government agents at the time were trespassers and their entry into the wash house amounted to force or force by stealth.

The house had been under surveillance by a number of federal agents from sundown (approximately 6:45 P. M. at this time of the year) until after midnight when the arrests were made. Certainly they could have obtained a search warrant or an arrest warrant during this period. No reason appears why an arrest warrant or a search warrant could not have been sought or obtained.

The Supreme Court has distinctly held that this is a grave question. It has not been decided by the Supreme Court and counsel for petititoners submit that it should be.

II. The decision of the Court below is in direct conflict with applicable decisions of this Court and other Courts of appeal.

The federal officers testified at petitioners' trial that they secreted themselves in woods directly behind petitioner's wash house. There is no testimony in the record as to whether these woods were on the lot on which petitioner's house and wash house were located. However, Agent Briggs testified as follows: "And at this time Mr. Ledford and I went into the yard from the woods, the woods being off the curtilage. We went to the door of the barn and stood there for several moments, during which time I heard voices inside commenting on the number of cases they had".

In the case of *Silverman v. United States*, 365 U. S. 505, 5 L. Ed. (2d) 734, 81 S. Ct. 679, the Court at page 739 of 5 L. Ed. (2d) said: "This Court has never held that a federal officer may without warrant and without consent

physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard".

The above quotation of the Supreme Court is unquestionably the law of the land. Although the federal agents were not actually in petitioner's house they at that time had secreted themselves at midnight just outside of his door and there secretly listened and related at petitioners' subsequent trial what they heard.

The Court of Appeals (Page 27 of Appendix) said that the agents paused at the door and heard the petitioners discussing the number of cases they had. Petitioners point out that Agent Briggs testified that they went to the door of the barn and stood there for several moments during which time they heard the voices inside (Page 28 of Appendix).

The Court of Appeals held (Page 29 of Appendix) "In the absence of any testimony whatever that the woodlands were owned by O'Neal, there is no basis for a finding that the agents committed even a technical trespass as they observed the defendants' activities from their concealed position in the woodlands". Petitioners point out that Agent Briggs testified (Page 17 of Appendix) "This particular patch of woods comes right up to the back of the barn at approximately—well, just a short distance behind the barn, 15 or 20 feet, and the barn is about 40 steps from the house, the back of the house". Agent Briggs later testified (Page 19 of Appendix) "and I went into the yard from the woods, the woods being off the curtilage".

It would seem to counsel for petitioners that in the absence of testimony that Agent Briggs knew the size of petitioner's lot or had seen a plat or public records pertaining thereto that the Federal Courts of this Nation would

not assume that woods right up to the back of his wash house were not within the curtilage of petitioner's home.

As a matter of fact, this assumption is in direct conflict with rulings from other Circuits of the Federal Judiciary Court of Appeals System. See the following cases: *Walker v. United States*, 225 Federal (2d) 447 (the Court's attention is particularly drawn to this case), *Morrison v. United States*, 262 Federal (2d) 449, 104 U. S. Appeal 352; *Care v. United States*, 231 Federal (2d) 22, and *District of Columbia v. Little*, 178 Federal (2d) 13, 85 U. S. Appeal D. C. 242.

The District Court below did not rule on this particular point and there was no finding of fact about it.

In view of the clear-cut rule of law stated in the *Silverman case*, petitioners' counsel feel that there is a clear-cut conflict between the decisions of the Court below and the *Silverman case* and the Court should intervene in order to bring about uniformity in the administration of Federal Courts and in the interest of justice.

CONCLUSION

For the foregoing reasons this petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN P. GARDNER,
ROBERT L. KILGO,
Attorneys for Petitioners.

INDEX TO APPENDIX

	PAGE
Motion in Chambers to Suppress Evidence	11
Motion Overruled	15
Jury Trial Waived	16
Testimony:	
Robert R. Briggs	16
Order	26
Decision of Court of Appeals for Fourth Circuit Affirming District Court	27

MOTION IN CHAMBERS TO SUPPRESS EVIDENCE

IN CHAMBERS:

The COURT: What is your motion?

Mr. GARDNER: I gave them the original. This is a copy of it, Judge.

Judge, this is a motion to suppress evidence acquired on—I believe it was June 12, 1960—I am not certain about that date—when certain officers of the Alcohol Tax Unit went to the home of the defendant and hid in some woods approximately a hundred yards back of his house.

Now the defendant's home is in a suburb of Darlington and right back of his home is a garage and wash house, in which there is plumbing, washing machines, and so forth. And there are two divisions to the thing. And the two defendants on this night—I think it was about 11 o'clock—went to the garage and the officers came from the woods as they went in the garage and flashed a flashlight in there and saw some unstamped liquor, and they arrested the defendants.

Now in addition to that, I believe there were some fruit jars in the shrubbery next to the steps going into the house.

Now it is our position that this search violated the defendant's rights under the Fourth Amendment, and we have cases that are just squarely in point.

The COURT: Didn't I decide that at Anderson—Tom Wofford's case? That was an automobile where they flashed a light in an automobile and saw it. I think I had it printed.

What are your cases?

Mr. GARDNER: *Walker v. United States*, and there is a whole list of cases—75 cases.

The COURT: I am not going to read that many this morning.

Mr. GARDNER: This particular case right here gives a good expression of the law, and this is a similar case.

The COURT: This was an automobile case where they stopped his automobile and took a flashlight and saw inside the car these cases of liquor.

What is the difference between this case and that case?

Mr. GARDNER: This case shows the exceptions.

The COURT: Read that case, the part you rely on.

Mr. GARDNER: This case holds that the three exceptions to the protection of the amendment is: where you have a movable vehicle. That is one exception. And next where you have a valid arrest with a search warrant and the search is incidental to the arrest. And the other is unusual circumstances where the search is incidental to the arrest rather than the arrest being incidental to the search. They held that the:

> "Barn was part of the owner's curtilage, and was within protection against unreasonable searches and seizures, though it was 70 to 80 yards from house and separated from house by private driveway and was surrounded by fence in which was a gap allowing entrance into barnyard from driveway in front of house."

The COURT: Did they search the barn?

Mr. GARDNER: The Court held that the barn was within the curtilage and therefore protected by the Fourth Amendment. It was a whiskey case. They had a report that the man had whiskey and they drove up to his yard and they smelled whiskey in this barn.

The COURT: And yours was a garage?

Mr. GARDNER: Mine is a wash house, Judge, where this man's wife does his laundry; and in addition they had various parts of old furniture and things of that kind in there.

This case here is *Walker v. United States.*

The COURT: What circuit is the case from?

Mr. GARDNER: The 5th Circuit.

The COURT: Do you have one from the 4th Circuit?

Mr. SIMPSON: There is one from the 4th Circuit that is in point, the *Clifton case.*

Mr. GARDNER: I don't think it is in point.

The COURT: You say it is not in point?

Mr. GARDNER: There is a clear distinction.

The COURT: What is the difference?

Mr. SIMPSON: We are not actually in agreement but we are not far off actually. Our contention is that what happened on this occasion: these officers had themselves secluded where they could observe these premises for some

several hours. They saw the activity. They heard in this barn what to them was unmistakably the noise of lids popping on hot liquids. These boys are all experienced officers and they have heard this noise numerous times. They know that the lids will pop as the liquid cools. They smelled the unmistakable odor of liquor coming from the barn. And more important, they watched a car come in there at 11:20. They watched two men unload 16 half-gallon fruit jars from the trunk of this car. When the men walked out of the barn they were arrested, and right in the barn was 189 gallons of whiskey.

The COURT: If those are the facts, I couldn't suppress the evidence. They had a right to arrest them and search the barn.

Mr. GARDNER: Judge, I believe under identical circumstances—

The COURT: I can't suppress it under those circumstances.

Mr. GARDNER: Judge, if you will read this case.

The COURT: What did the Fourth Circuit case say?

Mr. SIMPSON: The Clifton situation arose in the Eastern District of South Carolina and went to the 4th Circuit Court of Appeals, and certiorari was denied in the Supreme Court.

Here the officers went to the home of Clifton on October 9, 1953, and made arrangements with one Padgett to buy liquor. Padgett went in Clifton's house and brought out the liquor and sold it to the agents. Now this was on the 9th. They went back on the 17th under identical circumstances. They went and got Padgett and brought Padgett back to Clifton's home and Padgett sold them liquor. They placed him under arrest and then searched the house. The question was raised before Judge Timmerman as to whether or not the search of Clifton's home was unreasonable. Now here they had from the 9th until the 17th to obtain a warrant. They had the information in this case, and Judge Timmerman said it was not an unlawful search, the offense having been committed in their presence. The case went up to the 4th Circuit Court of Appeals and it was upheld, and the Court said:

"The investigators had just purchased untaxed whiskey from Padgett after watching him obtain it from the room which they later searched. The search did not extend beyond the room from which the whiskey had come, and no force was used. Under these circumstances, we feel that the search was reasonable."

Now in this case the felony was committed in the presence of the officers.

I am familiar with the *Walker case*. There were two defendants. One defendant was in the barn and he pled guilty. Walker was out in the yard working on a tractor.

The COURT: Who wrote the opinion in your case? I have been holding Court in Florida for 9 years.

Mr. GARDNER: Judge Cameron, and Judge Rives dissented.

The COURT: Who was the other Judge? I know them all down there.

Mr. GARDNER: Judge Dawkins.

Mr. SIMPSON: In this case there is one clear distinction. I agree with the dissent. Walker made the motion. He was in the yard working on a tractor. The officers went in the barn and arrested the defendant in the barn, found the stuff, and came back out and arrested Walker. In our case we say that clearly the arrest was first and right there was the whiskey.

Mr. GARDNER: In the case before the Court or in the Clifton case?

Mr. SIMPSON: In the case before the Court.

The COURT: There is no question about it under the statement of facts given by Mr. Simpson. But regardless of any of these cases, I cannot rule on it finally until I hear the testimony. I will reserve my ruling until I hear the testimony. And I will excuse the jury while that testimony is being produced.

Mr. GARDNER: We submit that in the case now before the Court the arrest was incidental to the search, that they made the search and it was an illegal search and it was an unconstitutional search, and the arrest was only incidental to the search. In the *Clifton case* they went to the man's house and bought liquor outside, and the man went back in

—and then they made the arrest, so the search was incidental to the arrest.

The COURT: He said the agents saw the man transporting supplies, and will so testify.

Mr. GARDNER: They won't testify that they saw them transporting supplies.

Mr. SIMPSON: No, sir. They smelled the odor of liquor, heard the jars in the barn popping, and then observed someone unload from the trunk of a car what they were able to identify as Mason jars, half-gallon fruit jars. They saw them unload them from the trunk of a car and went up to the barn.

The COURT: Well that is a felony that was committed within the view and sight of the officers.

Mr. SIMPSON: That is exactly our position.

The COURT: In other words, I can arrest a man that commits a felony in my presence.

Mr. SIMPSON: And what search there was ensued.

Mr. GARDNER: As a good illustration, there was a case that came out of New York—I don't have it before me, but I am familiar with it—I can get it just by getting a digest—where an officer knew a man to deal in liquor—

The COURT: I will agree with you on that. Just because he is a liquor dealer is not enough. I agree with you on that, but here is a man who was unloading fruit jars.

Was this in the nighttime?

Mr. SIMPSON: At night, yes, sir.

MOTION OVERRULED

The COURT: At 11 o'clock at night. I will have to overrule your motion. You have a record of it.

IN COURTROOM:

December 10, 1962.

JURY TRIAL WAIVED

Mr. MOZINGO: Your Honor, we would like to waive a jury trial and have the Court try the case.

The COURT: Of course, they have to waive a jury trial in writing personally and also by their attorneys in order to comply with the rule. They are entitled to a trial by a petit jury but I am willing to try it under the circumstances.

Mr. MOZINGO: We hate to ask you to do it, your Honor.

The COURT: That is the only way to do it, because, in other words, you can bring out everything you want to on examination about whether or not I should suppress the evidence, and then I will rule on it. Otherwise, the jury will be coming in back and forth, and we would have to take the testimony while the jury is out and go all over it again in their presence. And this will save time. I don't mind trying it.

The CLERK: Do the defendants desire to waive arraignment?

Mr. MOZINGO: Yes, sir.

The CLERK: And do they desire to enter a plea of *Not Guilty* as to each of them?

Mr. MOZINGO: Yes, sir.

TESTIMONY

TESTIMONY FOR GOVERNMENT

Robert R. Briggs, sworn.

DIRECT EXAMINATION

By Mr. ROBINSON:

Q. Your name is Robert R. Briggs?

A. Yes, sir.

Q. By whom are you employed?

A. Alcohol and Tobacco Tax Division, Treasury Department.

Q. How long have you been so employed?

A. Approximately 8 years.

Q. Were you so employed on the evening of June 10, 1960?

A. Yes, sir.

Q. Would you give the Court the benefit of your activities on June 10, 1960?

A. On the evening of June 10, 1960—

Q. At approximately what time?

A. Approximately dusk dark, Investigators H. W. Ledford and W. T. Bishop and I went to the area surrounding the home of Gene O'Neal in the Old Hartsville Road Section of Darlington County.

Q. Now when you got in the area of his home, where did you station yourselves?

A. We positioned ourselves in the woods directly behind Mr. O'Neal's house and barn.

Q. Go ahead.

A. This particular patch of woods comes right up to the back of the barn at approximately—well, just a short distance behind the barn, 15 or 20 feet, and the barn is about 40 steps from the house, the back of the house. It was dark and we could see a light—

Mr. GARDNER: If the Court please, at this time I would like to enter an objection just to pres ve our rights under the motion we made and ask that it go to all of this testimony.

The COURT: All right. Let the record show that counsel for the defendants enters an objection to all of this testimony on the ground that it involves unreasonable search and seizure as prohibited by the United States Constitution.

Go ahead.

This objection goes through all of this witness' testimony, and it is not necessary for him to enter any further objection on this point.

Mr. GARDNER: Yes, sir. Thank you.

The COURT: That protects your rights.

Go ahead.

Q. Go ahead, Mr. Briggs.

A. We could see lights shining through small cracks in this barn, and occasionally we could hear slight sounds

and movements, and we could also detect the odor of non-tax paid whiskey coming from the barn.

Q. How far away were you from the barn at that time?

A. About 20 feet. About 9:45 p. m., an old model Ford sedan drove into the yard and stopped in front of the barn. We could hear voices and I could also hear sounds such as, in my experience, were made by heavy cardboard containers being scraped against each other, and also hear the occasional tingling of glass jars or glass. These sounds continued for a few minutes, and then this car backed up to the side of the barn, towards the rear, facing our position. At that time two unidentified men loaded two propane gas cylinders into the trunk of this car. There were several of these gas-cylinders at the rear of this little barn.

Q. Were you able to hear any conversation between any of the parties at this time?

A. Yes; one of the parties asked the other one if he was going to take the jars. I didn't hear his reply. After the cylinders were loaded, the car left.

THE COURT: After what was loaded?

A. These gas cylinders.

THE COURT: Oh, cylinders. All right. Go ahead.

A. About 11 o'clock an old model Chrysler Corporation car drove into the yard and a man got out. This man got into a 1959 black Chevrolet that was sitting in the yard and drove off. A few minutes later this same car returned and two men got out and went into the house. There was a back porch light over the back steps. They went in. I recognized Johnnie Young as one of them.

Q. Is that one of the defendants?

A. Yes, sir.

Q. Can you point him out?

A. The man with the gray sport coat on. They went in the house and several minutes later came back out, and as they came back out I also recognized Gene O'Neal.

Q. Is he in the courtroom?

A. Yes, sir.

Q. Point him out.

A. The gentleman behind Mr. Gardner.

The COURT: Gene O'Neal went in the house?

A. Yes, sir.

The COURT: And you saw him come out?

A. I wasn't certain when he went in, but I got a better look at him when he came back out. They got in this black '59 Chevrolet and drove off. About 12:15 on the morning of the 11th, the '59 Chevrolet returned, and at that time Mr. O'Neal and Mr. Young begin unloading what appeared to be empty cases of fruit jars into the yard.

Q. Were you able to hear anything at that time?

A. No, sir, I could not hear any conversation. They unloaded the jars and then they went into the barn. And at this time Mr. Ledford and I went into the yard from the woods, the woods being off the curtilage. We went to the door of the barn and stood there for several moments, during which time I heard voices inside commenting on the number of cases they had. At this time the door opened and as Johnnie Young attempted to come out, we arrested he and Mr. O'Neal.

Q. After you arrested them, what did you do?

A. I having known them before, I told Gene that of course he knew that he didn't have to make any statement whatsoever, but if they did that it could be used for or against them in court.

Q. Did they make any statements?

A. Well he said that they did admit having brought the jars to the yard that were in the car. And Mr. O'Neal stated that was the first time that he had ever hauled anything in that car.

Q. Did Mr. Young make any statement?

A. Yes, I believe he said that he had come there to get Mr. O'Neal to go play poker.

The COURT: Who said that?

A. Mr. Young.

The COURT: Go ahead.

Q. Did you at any time enter the barn?

A. Yes, sir.

Q. When did you enter the door?

A. We were just in it, inside the barn, as we made the arrest.

Q. Did you make any search of the barn?

A. Yes, sir, we counted the whiskey and determined that it was non-tax paid whiskey.

Q. How much was it?

A. 189½ gallons.

Q. Did you make a search of any of the vehicles that were present?

A. Yes, sir, we searched the vehicles and there were no more jars in the Chevrolet. I think there were 16 cases sitting around the back side of the car in the yard.

Q. They were out of the car?

A. Yes, sir.

Q. No further questions.

CROSS EXAMINATION

By Mr. GARDNER:

Q. Mr. Briggs, I believe you say that you have been employed for 8 years with the Alcohol and Tobacco Tax Division, is that right?

A. Yes, sir.

Q. Now you say you came to this particular spot at about 9:45 on the evening of the 10th?

A. No, sir.

Q. What time did you say?

The COURT: Counsel is asking him these questions on cross examination subject to his objection to that testimony. You are not waiving that objection?

Mr. GARDNER: No, sir, we are not waiving it at all.

Q. What time did you arrive there that afternoon?

A. I don't know the exact time. It was just getting dark.

Q. Now you never did measure the distance of this barn from the house, did you?

A. No, sir.

Q. So if there is an affidavit on record in which Mr. O'Neal says it is about 30 feet from the house, that could be about right, isn't that right?

A. Yes, sir, it could be.

Q. Now how far back of the barn is the woods?

A. To the best of my judgment 15 or 20 feet.

Q. 15 or 20 feet.

A. That's right.

Q. Now how deep is the barn or garage?

A. I am not certain, but I would say it is a small barn —not more than about 10 or 15 feet deep.

Q. Now that would make it 30 feet; the depth of the barn and then 15 or 20 feet to the woods; and then the distance of the barn to the house, to where you saw them get out of the car, is that right? They got out of the car right at the back door, didn't they?

A. Yes, sir.

Q. Now, Bob, when you were in the woods, you said that two unidentified men drove up to the garage and got out and you heard some tingling of glass, and you thought you smelled the odor of non-tax paid whiskey. Is that your testimony?

A. I said I detected the odor of non-tax paid whiskey.

Q. Before this car ever arrived, you detected the odor of whiskey?

Yes, sir.

Q. After you went in and searched, was any of the liquor open or was it in jars with the tops screwed down?

A. I don't recall if there was any open or not.

Q. But there wasn't any liquor there in the vat?

A. (No answer).

Q. Now you said that you detected the odor of non-tax paid whiskey. Is that a definite certainty? Could you have sworn that the tax was not paid on that that you smelled?

A. I would have to smell it on that particular occasion.

Q. Now, Bob, you said that when they drove up in the car about 12:15, that they unloaded, or Gene unloaded what appeared to be empty fruit jars. Now were they in cartons?

A. Yes, sir.

Q. Now if they were in cartons, could not that have been canned goods or anything else, as far as you knew at that particular time?

A. (No answer).

Q. Well I will put it this way: You did not see a jar, you saw a cardboard box, isn't that true?

A. With the word *Atlas* written on it, which in this section commonly contains fruit jars.

Q. Well at 40 yards, you couldn't read the word *Atlas* at night, could you?

A. I wasn't 40 yards away.

Q. Well, say 35 or 40 feet, could you read the word *Atlas?* You didn't see the word *Atlas* until after you got up there at the house, did you?

A. Yes, sir.

Q. You could read the word *Atlas* that far back?

A. (Nods yes).

Q. But you did not see any jars until after you made the arrest, isn't that true?

A. Just the containers, the cardboard containers.

Q. You saw some cardboard boxes?

A. Yes, sir.

Q. But you did not see jars until after the arrest?

A. (No answer).

Q. Now when you made your appearance at about 12:15, you saw Johnnie and Gene go into the garage and you walked up to the door of the garage, and as Johnnie Young walked out you arrested him, is that true?

A. That's right.

Q. And then as Gene O'Neal walked out, you arrested him, is that true?

A. Not exactly. They just took about one step to come out and they were both within a half a foot of each other, right standing next to each other. They didn't walk out.

Q. And you put them under arrest at that time?

A. Yes, sir.

Q. Now it was after the arrest that you then searched the place for the bottles?

A. Yes, sir.

Q. It was after the arrest that you went and found the boxes next door to the back steps, is that true?

A. Yes, sir.

Q. Now after the arrest, isn't it true that Johnnie Young immediately told you that this wasn't his liquor, he knew nothing about it, and he had come to go play poker in their regular poker club, isn't that true?

A. That's right.

Q. Very well.

MR. GARDNER: Nothing further, Your Honor.

THE COURT: What time was this? What time did you arrest them?

A. Just after midnight.

RE-DIRECT EXAMINATION

By Mr. ROBINSON:

Q. Mr. Briggs, let me ask you one question: When the barn door was opened and you placed O'Neal and Young under arrest, were you able to see the inside of the barn in the position in which you were standing on the outside? Were you able to see inside the barn?

A. No, sir.

Q. I am talking about after you placed the defendants under arrest?

A. Well I was inside the barn when I made the arrests; just inside of it.

Q. Were you able to see what was inside of that barn from that position?

A. Yes, sir.

Q. What did you see?

A. A number of cases of fruit jars.

Q. Thank you.

RE-CROSS EXAMINATION

By Mr. GARDNER:

Q. Bob, I don't want to make an issue of this, but as I understood it, when you told me you came up there and Johnnie stepped out of the barn and you arrested him, and then almost immediately you arrested Gene, is that right?

A. They were both arrested at the same time.

Q. All at the same time. And then you made the search and found the whiskey, isn't that true?

A. That's right.

THE COURT: Did you make the search? As I understood it, you said that you went in the barn and you could see these cases. Did you make any actual search, go around and look, and turn up things, and one thing and another, or could you see it? How far in the barn were you?

A. I guess about a foot or foot and a half.

The COURT: Well could you see what was in there from that distance?

A. Well there were two stacks of whiskey, one on both sides of Mr. O'Neal and Mr. Young, and the whiskey—

The COURT: Could you see that, one foot inside the barn?

A. Yes, sir, it was just two feet in front of me.

The COURT: All right.

Q. Bob, I understood on direct examination that you made the arrest and then saw the whiskey, isn't that what happened?

A. No, sir. I said I made the arrests and then the search. I didn't look in the containers until after the arrest was made.

Q. Well the barn was dark, there wasn't a light in it, was there?

A. There was a light in there, yes, sir.

Q. What kind of light?

A. I don't recall.

Q. There was a little dim light on the end of a flashlight is all, isn't that true?

A. I don't recall, but I do know that we had our flashlights on also.

Mr. ROBINSON: You may come down.

I would say to the Court that I have Investigators Ledford and—excuse me one second. I have the other Investigators available, but their testimony would only be cumulative, Your Honor, so we will not put them up at this time.

The COURT: Do you want to examine them?

Mr. GARDNER: Your Honor, we won't offer any testimony.

When Your Honor cares to hear us, we would like to say a few words for about 30 seconds.

The COURT: Let me read this case here, and then I'll hear you.

The reason I asked those last two questions—have you read *United States v. Strickland?* That is my opinion dated September 25, 1945, and the headnote says this: And

I will hear you on it. That is the reason I asked those last questions, because I remembered this case. That was a pretty long time ago but I do remember it.

"A search implies some exploratory investigation, and merely to observe that which is open and patent in either sunlight or artificial light is not a search under the Constitution and Fourth Amendment."

MR. GARDNER: If Your Honor please, I don't believe I remember the case, but that case involved an automobile, I believe.

THE COURT: Yes, that was an automobile. Read it. It is not very long. (Reads case.)

You don't make any point about the arrest, as I understand, but it is the unlawful search and seizure.

MR. GARDNER: Yes, sir, and that he didn't have an arrest warrant.

THE COURT: The arrest, too? All right.

Well under this decision, it seems to me that I am bound to hold that the search was—this case is quite lengthy. I have gone into quite a good deal of it, and my law clerk says it wasn't appealed. I don't know whether it was or not. I don't remember.

Anyway, under that decision, I am still of the same mind.

Now here is another case from the Fourth Circuit, *Robert Francis Clifton v. United States*. Have you got that case?

MR. GARDNER: Yes, sir, I have read that case.

THE COURT: That is the case that was cited by the government the other day, wasn't it?

MR. GARDNER: Yes, sir.

THE COURT: I have got the Advance Sheet on it. (Reading case.)

Well, you boys have read it. There is no use for me to read it to you again. All right, I will hear your argument.

MR. GARDNER: Well, I am not going to say much, Your Honor. I believe counsel for the government and I have agreed that he did not have a search warrant or an arrest warrant, and we would like for the record to show that.

THE COURT: You admit that?

Mr. ROBINSON: Yes, sir, we admit that.

The COURT: I think the witness testified to that.

Mr. GARDNER: Yes, sir. And as I understand it also, I believe Your Honor said you have already ruled, and I want to certainly be most deferential towards it. I have just one observation, that the well-recognized exception to the rule of searches and seizures is of a moving vehicle. The courts time and time again have ruled that a moving vehicle is not covered by the Fourth Amendment.

The COURT: Well the *Carroll case* on which I relied, I don't believe was a vehicle.

Mr. GARDNER: You don't think the *Carroll case* involved a vehicle?

The COURT: No. The *Strickland case* was a vehicle but I relied on the reasoning in the *Carroll case* in deciding the *Strickland case*.

Mr. GARDNER: Yes, sir. Well, we have nothing further to say, Your Honor. I realize, of course, that we have already argued our motion.

The COURT: Yes, you argued it in Chambers and I disagreed with you.

Mr. GARDNER: We realize that Your Honor has nothing but the evidence of the officer. We would like to point out here before making your decision, the only thing is Mr. O'Neal, of course, is obviously guiltier than Mr. Young is. At the time everybody admits that he said it wasn't his whiskey and Mr. O'Neal and everybody agreed with him.

ORDER

The COURT: I will have to find both of the defendants guilty. I don't know about all of the counts in the indictment, however. Well, the removal, I find them guilty on that, and the concealing I find them guilty on that. The third count—well I find them guilty on all three counts of the indictment. Let them come around.

DECISION OF COURT OF APPEALS FOR FOURTH CIRCUIT AFFIRMING DISTRICT COURT

HAYNSWORTH, Circuit Judge:

Convicted of violations of the revenue laws relating to whiskey, the defendants have appealed, contending that their preliminary motions to suppress evidence were erroneously denied. We affirm, for we find no illegal search or seizure.

Shortly after dark one evening, revenue agents stationed themselves in some woods from whence they could observe the rear of a house owned by the defendant, O'Neal, and in which he resided. To the rear of the house and not far from the woods was a small barn or washroom. The record contains no precise measurements of the distances, but witnesses estimated that the barn was up to 120 feet from the rear of the house and up to twenty feet, or so, from the edge of the woods, where the agents had concealed themselves. There was no evidence that the woodlands were owned by O'Neal. The revenue agents, when testifying, referred to the woods as being outside the curtilage.

From their vantage point in the woods, the agents observed the comings and goings of several cars at night. They saw the defendants leave and return. They witnessed the unloading by the defendants of cardboard cartons, which they recognized as containing half-gallon fruit jars used in the illicit whiskey business, their recognition being based upon the labels upon the cartons and the occasional tinkling sound of the jars striking each other as the cartons were being handled. They observed the loading of propane gas cylinders upon a truck at a point near the barn, cylinders which they knew to be frequently used to supply fuel in the operation of illicit distilleries. They heard sounds emanating from the lighted barn and smelled the odor of illicit whiskey coming from it.[1]

Some time after midnight, the agents approached the barn door, knowing that the two defendants were within. As they paused at the door of the barn, they heard the de-

[1] There were cracks in the siding of the barn through which the light and the odors within escaped.

fendants discussing the number of cases they had. Thereupon, the door was opened by the defendant, Young, who was undertaking to leave, then being unaware of the presence of the agents outside. Both of the defendants were immediately arrested. At the time, within the barn and in plain view of the arresting agents, there were some 189½ gallons of illicit whiskey. The agents were of the opinion that they probably were just within the open barn door when the arrests were made.

The Fourth Amendment, which protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ," forecloses a search without a warrant for evidentiary material. Whatever reason law enforcement officials may have to believe that illegal activities are being conducted with a house, they may not, without a warrant, invade the house for the purpose of searching for and seizing evidence of criminal acts.[2]

It is settled beyond question, however, that where a federal law enforcement official has probable cause to believe that a felony is being committed in his presence he may arrest the apparent felon without an arrest warrant, and, incident to the arrest, he may conduct a reasonable search.[3]

Here, the agents had probable cause to believe the defendants were committing violations of the liquor laws in their presence. They had seen the defendants unloading the glass jars and engaging in other activities in the area of the barn indicative of their occupation in the illicit whiskey business. They had seen the defendants enter the barn from which there emanated the unmistakable odor of the illicit whiskey which was stored within it. From what they saw, heard and smelled while concealed within the woodlands, the agents had abundant cause to believe that the defendants

---

[2] *Taylor v. United States*, 286 U. S. 1, 52 S. Ct. 466, 76 L. Ed. 951; *Chapman v. United States*, 365 U. S. 610, 81 S. Ct. 776, 5 L. Ed. (2d) 828; *Silverman v. United States*, 365 U. S. 505, 81 S. Ct. 679, 5 L. Ed. (2d) 734.

[3] *United States v. Rabinowitz*, 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653; *Brinegar v. United States*, 338 U. S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879; *Agnello v. United States*, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145; *United States v. Lee*, 4 Cir., 308 F. (2d) 815.

were then engaged in packaging and handling moonshine whiskey.

Under these circumstances, their entry upon the rear portion of the lot upon which O'Neal's house was located for the purpose effecting the arrest was not unlawful.

If the agents' observations from the woods within which they were concealed be regarded as a search, it was not an unlawful invasion of O'Neal's house. In the absence of any testimony whatever that the woodlands were owned by O'Neal, there is no basis for a finding that the agents committed even a technical trespass as they observed the defendants' activities from their concealed position in the woodlands.[4] If their observation of the large quantity of whiskey stored in the barn be regarded as a search, it was plainly incident to, and contemporaneous with, the valid arrests which they effected when Young threw open the door of the barn. There was no breaking of doors nor misrepresentation of the purpose of the agents. Fortuitously, the door was thrown open before they had an opportunity to knock or announce themselves.[5] Before promptly effecting the lawful arrests, they observed only what was in plain view, indeed, what they could not avoid seeing.[6]

At the trial, the defendants offered no defense. They sought only to have excluded the evidence, the suppression of which they had sought by their preliminary motion. The denial of the preliminary motion to suppress the evidence is the sole ground of the appeal. Since we conclude that the motion to suppress was properly denied and the evidence properly received, the judgments of conviction are affirmed.

Affirmed.

---

[4] *See United States v. Benson*, 6 Cir., 299 F. (2d) 45; *United States v. Sims*, E. D. Tenn., 202 F. Supp. 65. Even a trespass on the grounds surrounding a building does not *per se* constitute an illegal search. *Hester v. United States*, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898; *Monnette v. United States*, 5 Cir., 299 F. (2d) 847; *Martin v. United States*, 5 Cir., 155 F. (2d) 503.

[5] *Cf. Ker v. California*, 374 U. S. 23, S. Ct. ..... L. Ed. (2d) .....

[6] *See Ker v. California*, *supra*, n. 5.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 532

GENE O'NEAL AND JOHNNIE JAMES YOUNG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-29; R. 22-26) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1963 (R. 27). The petition for a writ of certiorari was filed on October 10, 1963. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was probable cause for the arrest of petitioners without a warrant as one of them was leaving a barn in which illegal liquor was stored, and for the incidental seizure of the liquor.

STATEMENT

Petitioners were convicted on three counts of an indictment returned in the United States District Court for the Eastern District of South Carolina charging them with the unlawful removal, concealment and possession of non-taxpaid distilled spirits (Pet. App. 26). Petitioner O'Neal was fined $600 and petitioner Young $1200. Each was also sentenced to imprisonment for two years with provision that on payment of the fine, the remainder of the sentence be suspended and he be placed on probation for a period of five years.

The sole issue is the validity of the seizure of the liquor, which was the subject of a motion to suppress before trial (Pet. App. 11-15). The facts were developed at the trial before the court in the testimony of agent Briggs (Pet. App. 16, 24).

On the evening of June 10, 1960, agent Briggs and two other agents stationed themselves in some woodlands directly behind petitioner O'Neal's house and barn (Pet. App. 17), at a point which agent Briggs stated was "off the curtilage" (Pet. App. 19).

The distance from the woods to the back of the barn was about 15 or 20 feet, and it was about 120 feet from the barn to the house (Pet. App. 17, 20-21). The agents saw lights shining through small cracks in the barn, and could detect the odor of "moonshine" whiskey coming from it (Pet. App. 17-18). They heard sounds of heavy cardboard containers being scraped against each other and the tingling of glass jars. Shortly after 9:45 p.m., two unidentified men near the barn loaded two propane gas cylinders into the trunk of an old model Ford sedan which they had driven into the yard, and then drove away (Pet. App. 18). Sometime after 11:00 p.m., petitioners O'Neal and Young left the house and drove off in a black 1959 Chevrolet (Pet. App. 18-19). They returned about 12:15 and unloaded in the yard what appeared to be empty cases of fruit jars and entered the barn (Pet. App. 19, 21-22). The agents came from the woods to the door of the barn where they stood for several moments; they heard voices inside commenting on the "number of cases they had." At this time the door opened,* Young attempted to come out, and the agents arrested him and O'Neal (Pet. App. 19). At the time of the arrest, the agents were just inside the barn and the two petitioners were within a half foot of each other (Pet. App. 19, 22-23). The agents were able to see two stacks of whiskey about two feet in front of them. They seized

* Although the record is not explicit on this point, the inference is reasonable that it was petitioner Young who opened the door and was arrested as he walked out (Pet. App. 19, 22, 23).

189½ gallons of non-taxpaid whiskey (Pet. App. 20, 23-24). It was stipulated that the agents did not have a search warrant or arrest warrant (Pet. App. 25-26).

ARGUMENT

Petitioners were properly arrested on probable cause to believe that they had been committing a felony, and the seizure incident to the arrest was reasonable and valid. *United States* v. *Rabinowitz*, 339 U.S. 56; *Brinegar* v. *United States*, 338 U.S. 160.

From their vantage point in the woods the agents were able to detect the odor of "moonshine" whiskey coming from the barn. They had seen the hauling away of propane gas cylinders, customarily used in the operation of distilleries. They had also observed the petitioners unloading cartons of fruit jars, which they knew from their professional experience are used to bottle illicit whiskey. Thus, before they came near the barn, the agents had reasonable cause to believe that illicit whiskey was being bottled and stored on the premises.

At the barn the agents' belief was confirmed by overhearing petitioners' conversation in the barn as to the "number of cases they had."

There was no unauthorized forcible entry into the barn. The door was not even touched by the agents; it was opened by one of the petitioners preparatory to leaving (Pet. App. 19, 22, 23). At that time, with petitioners Young and O'Neal standing beside each other and the stacked whiskey, the agents clearly had probable cause to believe that

a felony (possession of non-taxpaid whiskey) was being committed in their presence. The arrests without a warrant were therefore legal. 26 U.S.C. 7608. The seizure of the whiskey was incident to the lawful arrest. The mere entry of the agents into the woods without permission would not invalidate the arrests even if the woods belonged to O'Neal. See *Hester* v. *United States*, 265 U.S. 57, 58; *Monnette* v. *United States*, 299 F. 2d 847, 850 (C.A. 5); *Giacona* v. *United States*, 257 F. 2d 450, 456 (C.A. 5), certiorari denied, 358 U.S. 873. The agents did not enter any building, not even the barn, until they had made the arrest. That circumstance distinguishes *Silverman* v. *United States*, 365 U.S. 505, where driving a spike microphone into adjoining premises for the purpose of listening was held to invade a constitutionally protected area.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

NOVEMBER 1963

U. S. GOVERNMENT PRINTING OFFICE 1963 — 711217